



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: M'INOTI, J.A. (IN CHAMBERS))

CIVIL APPLICATION NO. NAI. 89 OF 2017 (UR 66/2017)

BETWEEN

KENYA POWER & LIGHTING CO. LTD.....APPLICANT

AND

HARRISON MUSOGA OBIMBO.....RESPONDENT

(An application for extension of time to file and serve a notice of appeal out of time from the judgment and decree of the Employment & Labour Relations Court (Wasilwa, J.) dated 20th December 2016

in

ELRC CAUSE No. 63 of 2015)

RULING

In the motion on notice before me, the applicant, *Kenya Power & Lighting Company Ltd*, has applied for two substantive prayers, namely extension of time to file an intended appeal out of time against the judgment and decree of the *Employment & Labour Relations Court (ELRC) (Wasilwa, J.)* dated 20th December 2016, and for stay of execution of that decree. By dint of the provisions of *rule 53* of the Rules of this Court, I must restrict myself to the first limb of the application only as the jurisdiction to hear applications for stay of execution reposes in the full Court.

By the judgment that the appellant wishes to appeal, the ELRC found that the applicant had unfairly, unjustly and without following due process removed the respondent, *Harrison Musoga Obimbo*, from its payroll. The Court found that when the applicant purported to dismiss the respondent for absconding from duty, he was on sick leave duly approved by his supervisor. Accordingly the Court ordered the applicant to reinstate the respondent on the payroll within 14 days from the date of the judgment and to pay him all his outstanding salaries and allowances.

The judgment was rendered on 20th December 2016 and by dint of *rule 75(2)*, the applicant was obliged, if it was aggrieved by the judgment, to lodge a notice of appeal with 14 days. In the event no notice of appeal was filed and in the application before me, which was filed on 24th April 2017, the applicant seeks extension of time to file the notice of appeal and pursue the appeal process.

The affidavit in support of the application is sworn by *Mr. Owiti, Awuor*, the applicant's manager, legal

services, who deposes that before the ELRC the ***Federation of Kenya Employers (FKE)*** handled the claim on behalf of the applicant and that due to miscommunication between FKE and its lawyers, the applicant was not notified of the date of the judgment. He adds that the applicant only came to know of the judgment in or about February 2017 (no date is specified), when it was served with a copy of the decree. Thereafter the applicant moved to this Court to seek extension of time to file a notice of appeal before lodging the record of appeal.

The respondent opposed the application through a defective affidavit sworn by his counsel, ***Ms. Diana Odero***, which does not bear the date it was sworn. I shall treat the defect as of no moment since none of the parties raised the issue. While confirming that indeed the applicant was represented before the ELRC by FKE, counsel deposed that her firm sent a copy of the decree to the applicant for approval on 1st February 2017, but there was no response. One week later, on 8th February 2017, they served upon the applicant a copy of the decree duly approved by the court. It was the respondent's view that the applicant's delay from the date when it was notified of the judgment in February to 24th April 2017 when it filed this application was inordinate and unreasonable.

In its written submissions the applicant rehashed the background I have set out above and submitted that under ***rule 4***, this Court has unfettered discretion to extend time. It relied on the rulings in ***Leo Sila Mutiso v. Rose Wangari Mwangi, CA No. Nai. 255 of 1997*** and ***John Njoroge Michuki & Another v. Kentazuga Hardware Ltd, CA No. Nai. 16 of 1998***, regarding the considerations that this Court takes into account in an application for extension of time. The applicant concluded by submitting that the delay in this case was not inordinate and that based on its draft memorandum of appeal, the intended appeal had great chances of success, not the least because the learned judge erred in making an order for reinstatement, which is an exceptional remedy, without justification.

The respondent, who also filed written submissions, agreed with the applicant that the Court has unfettered discretion to extend time and on the grounds that guide the court in such applications. He however submitted that the discretion should be exercised judicially; that the applicant's delay in making the application for extension of time was inordinate; and that there was no evidence of miscommunication between FKE and its advocates. The respondent therefore urged me to find that the applicant had not placed before the Court any material on the basis of which I could exercise discretion in its favour.

Lastly the respondent submitted on the authority of ***M/s Port Reitz Maternity v. James Karanga Kabia, CA No 63 of 1997*** that the right of appeal should be balanced against the appellant's right to enjoy the fruits of his judgment. He argues that he has suffered and continues to suffer grave prejudice because he is sickly and the applicant has refused to pay his entitlement.

I have duly considered the application, the submissions by the parties and their respective authorities. The grounds upon which this Court determines applications for extension of time are well settled. In ***Fakir Mohamed v. Joseph Mugambi & 2 Others C.A. No. Nai. 332 of 2004***, the

Court expressed itself thus:

“As it is unfettered, there is no limit to the number of factors the court would consider so long as they are relevant. The period of delay, the reason for the delay, (possibly) the chances of the appeal succeeding if the application is granted; the degree of prejudice to the respondent if the application is granted, the effect of the delay on public administration, the importance of compliance with time limits; the resources of the parties, whether the matter raises issues of public importance are all relevant but not exhaustive factors ...”

Although the discretion of the court is unfettered, that discretion has to be exercised judicially rather than arbitrarily or capriciously. (See ***Julius Kamau Kithaka v. Waruguru Kithaka Nyaga & 2 Others, CA No. Nyr. 14 of 2013***). The applicant is obliged to place before the Court some material explaining the reason for failure to comply with the rules and any delay in taking remedial measures, because expeditious resolution of disputes is also an important constitutional principle under ***Article 159(2)(b)***. Whether the delay is inordinate or not will depend on the circumstances of each case.

The appellant submits that the failure to file the notice of appeal on time was occasioned by confusion between FKE and its advocates who failed to inform the applicant of the delivery of the judgment. If this were really the case, I would have expected an affidavit sworn by an officer of FKE or the advocate in question explaining the nature of the alleged confusion. There is no such affidavit and the applicant in its application and submission has not explained what the alleged confusion was. In paragraph 5 of his affidavit, Mr. Awuor does not even depose, as he is obliged to do, the source of his information as regards the alleged confusion.

The record before me shows that the applicant was served with a copy of the decree on 8th February 2017 and the same was duly received and acknowledged by the Manager, Legal Services, who should be Mr. Awuor. The application for extension of time was not made until 24th April 2017, which was a whole 74 days after the applicant was notified of the judgment and decree. Absolutely no reason has been given for this delay after the applicant was notified of the judgment, which in the circumstances I must find to be inordinate.

Regarding the chances of success of the intended appeal, I do not think it is apt to delve into its merits and demerits. In ***Athuman Nusura Juma v. Afwa Mohamed Ramadhan, CA No 227 of 2015***, I expressed myself as follows regarding the role of a single judge in determining the merits of an intended appeal in an application for extension of time:

“This Court has been careful to ensure that whether the intended appeal has merits or not is not an issue determined with finality by a single judge. That is why in virtually all its decisions on the considerations upon which discretion to extend time is exercised, the Court has prefixed the consideration whether the intended appeal has chances of success with the word “possibly”.

Even if I grant that the intended appeal is not frivolous, still the applicant’s delay remains unexplained. The respondent argues that he stands to suffer more prejudice than the applicant because the latter has, without first obtaining an order of stay of execution, refused to comply with the court order or to pay him any money to enable him seek medical attention.

Failure to explain the delay in complying with the rules as I have found to be the case in this application, amounts to saying that no valid reasons have been offered to justify exercise of discretion in favour of the applicant (See ***Heron Kosgei v. Republic & 2 Others, CA No. 246 of 2008***).

Accordingly, I find that this application is bereft of merit and hereby dismiss the same with costs to the respondent.

Dated and delivered at Nairobi this 6th day of October, 2017.

K. M’INOTI

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JUDGE OF APPEAL

I certify that this is a

true copy of the original

DEPUTY REGISTRAR